STATE OF MICHIGAN

COURT OF APPEALS

TERRI GILMORE,

Plaintiff-Appellant,

v

BIG BROTHER/BIG SISTERS OF FLINT, INC., and SYLVESTER JONES,

Defendants-Appellees.

UNPUBLISHED
May 21, 2009

No. 284704
Genesee Circuit Court
LC No. 05-082582-NZ

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff, Terri Gilmore, appeals as of right the trial court's order of summary disposition in favor of defendants, Big Brother/Big Sisters of Flint, Inc. (BBBS), and Sylvester Jones, the executive director of BBBS, in this action for wrongful termination and violation of the Whistleblower's Protection Act. Because plaintiff's WPA claim was time-barred and because the WPA encompassed plaintiff's public policy discharge claim, the trial court did not err when it granted summary disposition in defendants' favor, and, we affirm.

BBBS is a small nonprofit agency located in Flint, Michigan. BBBS hired plaintiff in October 1999 in an administrative assistant position. Plaintiff held administrative positions with BBBS until defendant Jones terminated plaintiff's employment on May 12, 2005. It is defendants' position that plaintiff was terminated for violating BBBS's confidentiality policy when she inappropriately disclosed confidential information to Dr. Cecilia Miller-Sims, an applicant for a position with BBBS. Plaintiff maintains that she was terminated because of her opposing, criticizing, complaining about, and threatening to report or disclose her suspicions that defendant Jones engaged in misconduct including misappropriation of public and private grant money and hiring a convicted felon to work at BBBS contrary to policy.

After her termination, plaintiff initially filed a grievance utilizing the problem solving procedure set forth in the BBBS personnel manual. However, when the grievance procedure reached the binding arbitration stage, plaintiff rejected that procedure and filed her complaint in circuit court on October 21, 2005. Plaintiff alleged claims of a violation of the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq*., and wrongful discharge. Defendants first moved for summary disposition of plaintiff's claims on December 21, 2005. In an order dated April 4, 2006, the trial court granted defendants' motion in part dismissing plaintiff's WPA claim as barred by the statutory limitations period, but denied summary disposition regarding the

remaining wrongful discharge claim as premature. After the discovery period closed defendants filed their second motion for summary disposition on March 14, 2007 arguing that plaintiff's wrongful discharge claim be dismissed. On June, 12, 2007, the trial court granted summary disposition in favor of defendants for the reason that plaintiff was an at-will employee under the BBBS employment manual in effect at the time of plaintiff's termination, but in the same order granted plaintiff an additional 14 days to file an amended complaint stating an actionable public policy retaliation claim. Though her amended complaint was filed late on October 1, 2007, the trial court accepted it. On January 7, 2008, defendants filed their third motion for summary disposition arguing that the trial court should dismiss plaintiff's allegations of public policy retaliation. The trial court granted summary disposition in defendants' favor on February 20, 2008 holding that plaintiff had not satisfied the requirements for a public policy retaliation claim. Plaintiff now appeals as of right.

Plaintiff first argues that the trial court erred as a matter of law in granting defendants' motion for summary disposition ruling that her WPA claim was time barred by the applicable statute of limitations because the statute was equitably tolled during the period of time plaintiff was required to follow defendants' three step grievance procedure as a condition precedent to any action against the company pursuant to the terms of the personnel manual. Defendants respond that the trial court properly dismissed plaintiff's WPA cause of action where plaintiff filed her claim long after the statutory limitations period. We review de novo a grant of summary disposition under MCR 2.116(C)(7). *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). Similarly, this Court reviews de novo the legal question concerning whether the applicable statute of limitations bars a claim. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997). When reviewing a motion for summary disposition under MCR 2.116(C)(7), we accept as true the plaintiff's well-pleaded allegations and construe them in the plaintiff's favor. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

Actions brought under the WPA must be brought within ninety days after the alleged violation of the act. MCL 15.363(1). The plain language of the statute explicitly states that:

> A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act. [MCL 15.363(1).]

Plaintiff was terminated on May 12, 2005, but did not file her complaint until October 21, 2005. Because 152 days passed from the date of termination to the filing of the complaint, plaintiff's claim was time-barred. Even so, plaintiff asserts that the statutory period should have been tolled while she voluntarily pursued resolution of the issues via a grievance procedure set out in the employment manual. But plaintiff provides no legal support for her argument. Plaintiff's citation to *American Federation of State, County and Mun Employees, AFL-CIO, Michigan Council 25 and Local 1416 v Bd of Educ of the School Dist of the City of Highland Park*, 457 Mich 74; 577 NW2d 79 (1998) does not apply because it involves a collective bargaining agreement where pursuing internal grievance procedures is mandated by negotiated contract. In *American Federation*, our Supreme Court held that where a collective bargaining agreement expressly states that a party "shall" use the grievance procedures provided under the contract terms, the statute of limitations governing suits brought by the union or an employee is equitably tolled until the mandatory grievance procedures have been exhausted, even if the result of the

mandatory grievance process is nonbinding arbitration. *Id*. at 89. Unlike *American Federation*, plaintiff was not a member of a union, she was not party to a negotiated collective bargaining agreement, and, as the trial court correctly stated, "[t]he grievance procedure in the personnel manual that plaintiff was following was not mandatory[.]" Under the circumstances, plaintiff could very well have timely filed her statutorily created WPA cause of action in the circuit court concomitantly with her voluntary grievance under defendant BBBS's personnel manual. As such, plaintiff's argument that the statutory period should have been tolled is without merit and the trial court properly granted summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants on this issue for the reason that plaintiff's WPA claim was time-barred.

Plaintiff also contends that the trial court erred when it granted summary disposition on her public policy discharge claim because her discharge falls within the common law public policy exception to the at-will employment doctrine. Defendants respond that summary disposition of plaintiff's public policy discharge cause of action was proper because plaintiff identified no public policy on which to base a public policy discharge cause of action. A motion for summary disposition under MCR 2.116(C)(8) is reviewed do novo and tests the legal sufficiency of the pleadings alone. *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). This Court also reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10), which tests the factual support for a claim. *McManamon v Redford Charter Twp*, 256 Mich App 603, 610; 671 NW2d 56 (2003).

In general, there is a presumption that employment for an indefinite duration is at-will employment. *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993). The presumption may be overcome by evidence of a contractual provision for a definite term or forbidding discharge without just cause. *Id*. at 117. "Such provisions may become part of an employment contract as a result of 'explicit' promises or promises implied in fact." *Id*., citation omitted. The employment manual plaintiff received in October 2001 specifically provides for at-will employment. However, plaintiff's claim of wrongful discharge is based on a violation of public policy. Such a claim may be sustained even where her employment was at-will.

In *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692; 316 NW2d 710 (1982), the Court recognized the exception to the general rule regarding at-will employment. It explained that "some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id*. at 695. This exception is most often expressed in "explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty," such as the WPA. *Id*. The exception is also applied in a second situation where the employer discharged the employee because the employee failed or refused to violate the law in the course of employment. *Id*. And, thirdly, it may be applied when the employee was discharged because she or he exercised "a right conferred by a well-established legislative enactment." *Id*. at 695-696. See also *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 484; 516 NW2d 102 (1994).

The main reasons plaintiff claims that she was discharged from defendant BBBS were that she confronted defendant Jones about his alleged hiring of a convicted felon in violation of BBBS policy and alleged payment of his cell phone bill with BBBS funds. Neither of these reasons falls within the second and third exceptions of the *Suchodolski* analysis. Plaintiff has not alleged that she was asked and refused to violate a law in the course of employment. And, the

asserted reasons do not implicate plaintiff's exercise of a right conferred by a well-established legislative enactment. *Suchodolski, supra* at 695-696; *Vagts, supra* at 484.

With regard to the first exception, plaintiff's public policy discharge claim is precluded because plaintiff stated a claim under the WPA. Where a victim of retaliatory discharge has a statutorily granted right to sue under the WPA, the victim may not also assert a claim of discharge in violation of public policy. *Vagts, supra at* 485, citing *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 79-80; 503 NW2d 645 (1993). Because the WPA could provide plaintiff relief for reporting defendants' alleged illegal activity, she cannot assert a public policy discharge claim. The trial court properly granted defendants' motion for summary disposition on plaintiff's public policy discharge claim because the WPA encompassed it.

Affirmed. Defendants may tax costs.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio